Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy (Wan Ahmad Azlan bin Wan Majid & Anor, Interveners) and another action

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4–22–758–1993
CONSOLIDATED WITH ORIGINATING SUMMONS NO CS 24–62–94
VISU SINNADURAI J
28 JUNE 1996

Contract *— Formation — Contract for sale of property — Parties signed memorandum of understanding ('MOU') — Purchaser paid deposit of 1% of purchase price — Balance of 9% to be paid upon signing of formal sale and purchase agreement on a certain date — Purchaser failed to sign formal sale and purchase agreement on date specified — Vendor sold property to third party — Purchaser claimed specific performance of contract based on MOU — Whether MOU resulted in a legally binding contract — Whether MOU only an agreement to negotiate*

Contract *— Formation — Contract for sale of property — Parties signed MOU — Whether intention of parties to be bound immediately upon signing of MOU or upon signing of formal sale and purchase agreement*

Contract *— Breach — Purchaser failed to pay balance of purchase price on date stipulated in MOU — No express provision that time of the essence — Whether time was intended by the parties to be the essence of the contract — Whether mere stipulation of completion date in contract by itself make time to be of essence of contract*

Land Law *— Sale of land — Caveat — Application for removal of caveat — Purchaser entered caveat upon signing MOU — Whether purchaser had caveatable interest in land*

This was an action brought by the plaintiff ('the purchaser') against the defendant ('the vendor') for specific performance of a contract of sale and purchase of a house ('the property'), based on a memorandum of understanding ('the MOU'). In accordance with the MOU, the purchaser paid a deposit of 1% of the purchase price and further agreed to pay another 9% upon signing of a formal sale and purchase agreement on or before 8 October 1993. In pursuance of this so-called agreement, the purchaser entered a private caveat over the property. The purchaser did not sign the formal sale and purchase agreement on 8 October 1993 as stated in the MOU, but on 11 October 1993. The vendor did not sign the formal sale and purchase agreement on the ground that it was not signed by the purchaser within the time period as stipulated in the MOU. The vendor then sold the property to another party, who were the interveners in these proceedings. The purchaser argued that upon signing the MOU, a binding contract came into existence. The vendor's contention was that there was no binding contract between the parties for the following reasons: (i) the MOU by itself was not a legally binding contract for

the sale and purchase of the property; and (ii) even if it was, as time was the essence of the agreement, the purchaser's failure to sign the formal sale and purchase agreement on or before 8 October 1993, as required by the MOU, entitled the vendor to terminate the agreement. In the originating summons commenced by the vendor — which matter was consolidated with the main civil suit — the vendor applied to this court for the removal of the caveat entered by the purchaser.

Held, dismissing the plaintiff's claim and ordering that the caveat be removed:

(1) In cases dealing with preparatory agreements where the intention of the parties plays a crucial role in determining its effect, each case must be decided on its own facts. In each case, it is the duty of the court to determine not only the nature of the document, but also the true intention of the parties at the time the document was executed — whether the parties intended to be bound by any contract immediately, or only on the fulfilment of certain conditions, eg the execution of a formal contract (see p 398G–H); *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 and *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108 followed.

(2) In certain exceptional cases where the intention of the parties is clearly established, an immediately binding contract may come into force, even though a formal agreement is to be executed subsequently (see p 399F); *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 followed.

(3) Considering the MOU as a whole, and in particular, the objective of the MOU, the 'genesis of the agreement' and the intention of the parties at the time of the signing, the MOU was not a legally binding agreement, and as such, unenforceable (see p 401B–C).

(4) A legally binding agreement could only come into force upon the execution of the formal sale and purchase agreement, by which time the parties would have considered all aspects of the sale in detail, and a formal agreement prepared by the solicitors to cover all these aspects of the sale for execution. Until the execution of the formal agreement — as there is no binding contract between the parties — the parties are at liberty to resile from the so-called agreement without any legal consequences flowing from such an action. Such clearly appeared to be the intention of the parties at the time of the

signing of the MOU, and that certainly is the effect of the MOU in law (see p 401C–E).

(5) Under s 56 of the Contracts Act 1950, in a contract for the sale of land, time is of the essence in two main situations: (i) where the intention of the parties was such that time was of the essence of the contract for the fulfilment of their respective obligations; and (ii) the nature of the subject matter or the surrounding circumstances are such that the time specified for the performance is of the essence (see p 405A–B).

(6) Where there is no express provision in the contract making time of the essence, the court will then have to consider the nature of the property, the surrounding circumstances and the nature of the contract to determine whether time was intended by the parties to be the essence of the contract (see pp 405D–F); *Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118, *Warren, HG v Tay Say Geok & Ors* [1965] 1 MLJ 44; *Koh Shey Guan v Lee Kok Chan* [1971] 1 MLJ 79, *Ayadurai v Lim Hye* [1959] MLJ 143 and *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23 followed.

(7) The MOU expressly stipulated that a formal sale and purchase agreement had to be executed and the sale transaction completed 'on or before 8 October 1993'. However, the mere stipulation of a date fixed for completion in a contract does not by itself make time to be of the essence of the contract. The nature of the property and the surrounding circumstances would still have to be considered. Considering the MOU as a whole, it appeared that time was the essence of the contract (see pp 405I, G and 406C); *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 followed.

(8) Even if the MOU was regarded as a binding contract, the failure on the part of the purchaser to pay the balance of the purchase price and to execute the sale and purchase agreement within the stipulated time entitled the vendor to repudiate the contract (see p 407E).

(9) Since there was no binding contract between the purchaser and the vendor under the MOU, or that even if there was one, the purchaser was in breach of the contract in not fulfilling the conditions stipulated in the MOU, the purchaser had no caveatable interest in the property (see p 407H).

Obiter dicta:

The use of MOU by estate agents ought to be discouraged and they should seek legal advice in drafting them. An option agreement whereby the purchaser pays a small consideration, and that contains

detailed terms of the sale and purchase, is more appropriate, as it gives the purchaser reasonable time to consider whether to commit himself to the purchase. And the vendor will be under an obligation not to sell the property to a third party until after the expiration of the option period. Alternatively, parties should be encouraged to enter into a lock-out agreement. With this, the vendor, for valuable consideration, agrees for a specified period of time not to negotiate with anyone except the potential purchaser in relation to the sale. This was given judicial recognition in *Walford & Ors v Miles & Anor* [1992] 1 All ER 453 and *Pitt v PHH Asset Management Ltd* [1993] 4 All ER 961. With conditional contracts, the parties ought to state expressly that in the event of any failure on the part of either party to fulfill their specified obligations, certain specific consequences will follow (see pp 401I, 402A–E and 403C–D).

[Bahasa Malaysia summary

Ini adalah suatu tindakan yang diambil oleh plaintif ('pembeli') terhadap defendan ('penjual') untuk pelaksanaan spesifik suatu kontrak jual beli sebuah rumah ('harta tersebut'), berdasarkan memorandum persefahaman ('MOU'). Mengikut MOU tersebut, pembeli membayar deposit 1% daripada harga belian dan selanjutnya bersetuju untuk membayar sebanyak 9% lagi apabila menandatangani perjanjian jual beli formal pada atau sebelum 8 Oktober 1993. Berikutan daripada perjanjian yang dikatakan itu, pembeli memasukkan kaveat persendirian ke atas harta tersebut. Pembeli tidak menandatangani perjanjian jual beli formal pada 8 Oktober 1993 seperti yang dinyatakan di dalam MOU itu, tetapi pada 11 Oktober 1993. Penjual tidak menandatangani perjanjian jual beli formal itu atas alasan bahawa ianya tidak ditandatangani oleh pembeli dalam masa seperti yang ditetapkan dalam MOU itu. Penjual kemudiannya menjual harta itu kepada pihak yang lain, yang merupakan pencelah dalam prosiding ini. Pembeli menghujahkan bahawa apabila MOU itu ditandatangani, satu kontrak mengikat wujud. Penjual menegaskan bahawa tidak ada kontrak mengikat antara pihak-pihak oleh kerana sebab-sebab berikut: (i) MOU itu dengan sendirinya bukan kontrak mengikat yang sah di sisi undang-undang bagi jual beli harta tersebut; dan (ii) jikapun ia adalah kontrak mengikat, oleh kerana masa adalah intipati perjanjian itu, kegagalan pembeli untuk menandatangani perjanjian jual beli formal pada atau sebelum 8 Oktober 1993, seperti yang dikehendaki oleh MOU itu, memberi hak kepada penjual untuk menolak perjanjian tersebut. Dalam saman pemula yang dimulakan oleh penjual — yang telah disatukan dengan guaman sivil utama — penjual memohon kepada

A mahkamah ini untuk membatalkan kaveat yang dimasukkan oleh pembeli.

Diputuskan, menolak tuntutan plaintif dan memerintahkan kaveat itu dibatalkan:

B (1) Dalam kes-kes yang berkenaan dengan perjanjian persediaan di mana niat pihak-pihak memainkan peranan yang penting dalam menentukan kesannya, tiap-tiap kes mesti diputuskan atas faktanya sendiri. Dalam tiap-tiap kes, adalah menjadi tanggung jawab mahkamah untuk menentukan bukan sahaja sifat dokumen C itu, tetapi juga niat sebenar pihak-pihak pada masa dokumen itu disempurnakan — sama ada pihak-pihak berniat diikat oleh apa-apa kontrak dengan serta-merta atau hanya setelah syarat-syarat tertentu dipenuhi, contohnya penyempurnaan kontrak formal (lihat ms 398G–H); *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 dan *Kam Mah* D *Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108 diikut.

(2) Dalam kes-kes yang luar biasa di mana niat pihak-pihak adalah dengan jelasnya dibuktikan, satu kontrak mengikat boleh wujud, walaupun perjanjian formal akan disempurnakan kemudiannya E (lihat ms 399F); *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 diikut.

(3) Menimbang MOU itu keseluruhannya, dan khasnya, tujuan MOU itu, 'asal-usul perjanjian' dan niat pihak-pihak pada masa perjanjian ditandatangani, MOU itu bukan satu perjanjian mengikat yang sah di sisi undang-undang, dan oleh itu, tidak F boleh dikuatkuasakan (lihat ms 401B–C).

(4) Perjanjian mengikat yang sah di sisi undang-undang hanya boleh berkuatkuasa atas penyempurnaan perjanjian jual beli formal, yang mana pada masa ini pihak-pihak telahpun menimbang semua aspek jualan dengan terperinci, dan perjanjian formal disediakan G oleh peguam untuk merangkumi semua aspek-aspek jualan itu untuk penyempurnaan. Sehingga penyempurnaan perjanjian formal itu — oleh kerana tidak ada kontrak mengikat antara pihak-pihak — pihak-pihak adalah bebas untuk menarik diri daripada perjanjian yang dikatakan itu tanpa apa-apa akibat H undang-undang timbul daripada tindakan tersebut. Ini adalah jelas menjadi niat pihak-pihak pada masa MOU itu ditandatangani, dan itu adalah sememangnya kesan MOU dalam undang-undang (lihat ms 401C–E).

(5) Di bawah s 56 Akta Kontrak 1950, dalam jual beli tanah masa I adalah intipati dalam dua keadaan: (i) di mana niat pihak-pihak

adalah bahawa masa adalah intipati kontrak untuk memenuhi tanggung jawab masing-masing; dan (ii) jenis perkara subjek dan keadaan-keadaan sekitaran adalah bahawa masa yang ditetapkan untuk pelaksanaan adalah intipati (lihat ms 405A–B). A

(6) Di mana tidak ada peruntukkan yang nyata dalam kontrak menjadikan masa masa intipati, mahkamah perlu mengambil kira jenis harta, keadaan-keadaan sekitaran dan sifat kontrak untuk menentukan sama ada masa diniatkan oleh pihak-pihak untuk menjadi intipati kontrak (lihat ms 405D–F); *Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118, *Warren, HG v Tay Say Geok & Ors* [1965] 1 MLJ 44; *Koh Shey Guan v Lee Kok Chan* [1971] 1 MLJ 79, *Ayadurai v Lim Hye* [1959] MLJ 143 dan *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23 diikut. B C

(7) MOU tersebut menetapkan dengan nyata bahawa perjanjian jual beli formal perlu disempurnakan 'pada atau sebelum 8 Oktober 1993'. Bagaimana pun, hanya dengan menetapkan tarikh untuk penyempurnaan dalam kontrak tidak dengan sendirinya menjadikan masa intipati kontrak. Jenis harta dan keadaan-keadaan sekitaran mesti diambil kira. Menimbang MOU tersebut keseluruhannya, masa adalah intipati kontrak tersebut (lihat ms 405I, G dan 406C); *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 diikut. D E

(8) Jika pun MOU itu dianggap sebagai kontrak mengikat, kegagalan pembeli untuk membayar baki harga belian dan untuk menyempurnakan perjanjian jual beli dalam masa yang ditetapkan memberi hak kepada penjual untuk menolak kontrak itu (lihat ms 407E). F

(9) Oleh kerana tidak ada kontrak mengikat antara pembeli dan penjual di bawah MOU itu, atau jika pun terdapat kontrak mengikat, pembeli telah melanggar kontrak dengan tidak memenuhi syarat-syarat yang ditetapkan dalam MOU itu, pembeli tidak mempunyai kepentingan yang boleh dikaveatkan dalam harta tersebut (lihat ms 407H). G

Obiter dicta:

Penggunaan MOU oleh ejen harta tanah sepatutnya tidak digalakkan dan mereka sepatutnya mendapatkan nasihat undang-undang dalam menderafnya. Perjanjian opsyen di mana pembeli membayar sedikit balasan, adalah lebih sesuai, kerana ia memberi pembeli masa yang munasabah untuk menimbangkan sama ada hendak meneruskan pembelian. Dan penjual adalah bertanggung jawab untuk tidak menjual harta itu kepada pihak ketiga sehingga tamat tempoh opsyen. Secara alternatif, pihak-pihak sepatutnya digalakkan untuk memasuki perjanjian sekat masuk. Dengan ini, penjual, untuk balasan bernilai, H I

bersetuju untuk tempoh masa yang ditetapkan untuk tidak berunding dengan sesiapa melainkan pembeli yang berpotensi berkaitan dengan jualan itu. Ini telah diberi pengakuan undang-undang dalam *Walford & Ors v Miles & Anor* [1992] 1 All ER 453 dan *Pitt v PPH Asset Management Ltd* [1993] 4 All ER 961. Dengan kontrak-kontrak bersyarat, pihak-pihak patut memperuntukkan dengan nyata bahawa sekiranya berlaku kegagalan oleh mana-mana pihak untuk memenuhi tanggung jawab mereka yang ditetapkan, beberapa akibat tertentu akan timbul (lihat ms 401I, 402A–E dan 403C–D).]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No W–03–39–95.]

Notes

For cases on formation of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1561–1600.

For cases on breach of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1185–1242.

For cases on caveat, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419 and 2498–2507.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47
Ayadurai v Lim Hye [1959] MLJ 143
Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754
Central Malaysia Development & Co Ltd v Chin Pak Chin [1967] 2 MLJ 174
Choo Si Seng v Lee Boon Sai [1986] 1 MLJ 466
Daiman Development Sdn Bhd v Mathew Lui Chin Teck and another appeal [1981] 1 MLJ 56
Diamond Peak Sdn Bhd & Anor v Tweedie, DR [1982] 1 MLJ 97
Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23
Jamshed K Irani v Burjorji Dhunjibhai (1915) LR 43 IA 26
Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24
Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108
Karuppannan Chellapan v Balakrishnan Subban & Ors [1995] 1 SCR 19
Koh Peng Moh v Tan Chwee Boon [1962] MLJ 353
Koh Peng Moh v Yahiya [1965] 1 MLJ 230
Koh Shey Guan v Lee Kok Chan [1971] 1 MLJ 79
Lim Keng Siong & Anor v Yee Ah Tee [1983] 2 MLJ 39
Loh Boon Siew v Chin Kim & Anor [1972] 1 MLJ 139
Low Kar Yit & Ors v Mohamed Isa & Anor [1963] MLJ 165

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719
Masters v Cameron (1954) 91 CLR 353
Perri v Coolangatta Investments Pty Ltd (1982) 56 ALJR 445
Pitt v PHH Asset Management Ltd [1993] 4 All ER 961
Tai Tong Realty Co (Pte) Ltd v Galstaun & Anor [1973] 2 MLJ 95
Von Hatzfeldt-Wildenburg v Alexander [1912] 1 Ch 284
Walford & Ors v Miles & Anor [1992] 1 All ER 453
Warren, HG v Tay Say Geok & Ors [1965] 1 MLJ 44
Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd [1996] 2 MLJ 81
Yeow Kim Pong Realty Ltd v Ng Kim Pong [1962] MLJ 118

Legislation referred to

Contracts Act 1950 ss 7, 30, 52 & 56(1),(2)
Specific Relief Act 1950 s 20(1)(c)

Saseedaran Achan (*Achan & Co*) for the plaintiff.
Sri Dev Nair and *AS Chandra Segaram* (*Ram Rais & Partners*) for the defendant.
Jasmeetpal Singh (*Wan Majid Mano & Nada*) for the interveners.

Visu Sinnadurai J:

Introduction

This court is called upon to construe a document, commonly referred to amongst estate agents in this country as a memorandum of understanding. I am given to understand that the true legal nature and effect of such a document has not been determined by the Malaysian courts in any earlier case.

This so-called memorandum of understanding is a document usually prepared by an estate agent by way of a standard form contract; and is executed by a potential purchaser on the one part, and by a vendor on the second part. On viewing a property which has been advertised for sale, and a purchaser expresses interest in purchasing the property, estate agents who have the mandate of a vendor to sell the vendor's property generally request a prospective purchaser to sign this document. Such was the position in the present case.

Facts

In the main civil suit, the plaintiff brought an action against the defendant for specific performance of a contract for the sale and purchase of a house. Based on the so-called memorandum of understanding ('MOU') mentioned

above, the plaintiff claimed that a legally binding contract came into force whereby the defendant agreed to sell the property to the plaintiff.

In pursuance of this so-called agreement, the plaintiff entered a private caveat over the said land. In the originating summons commenced by the defendant as applicant — which matter was consolidated with the main civil suit — the defendant applied to this court for the removal of the said caveat entered by the plaintiff.

As will be seen subsequently, the defendant did not complete the sale to the plaintiff, but instead sold the said property to a third party who are now the interveners in the main civil suit.

The salient facts of the present case are as follows. The defendant, who is the owner of a piece of property known as Lot 45284, Mukim Kuala Lumpur, Daerah Wilayah Persekutuan, No 23, Jalan Setia Bakti, Bukit Damansara, Kuala Lumpur gave a mandate to a housing agent to sell the property. On the introduction of the agent, the plaintiff, who was the prospective purchaser (for convenience, I shall refer to the plaintiff as 'the purchaser' and the defendant as 'the vendor') — on viewing the said property — expressed an interest in purchasing the property. The purchase price was said to be RM550,000. About a week later, the purchaser was asked to sign the MOU and the purchaser agreed to pay an earnest deposit of 1% of the purchase price on 27 September 1993 and further agreed to pay 9% of the purchase price upon the signing of a formal sale and purchase agreement on or before 8 October 1993.

It was further stated in the MOU that the purchaser would pay the balance of 90% of the price within 90 days of the signing of the formal sale and purchase agreement. It was also provided for in the MOU that the purchaser would be given a further grace period of 30 days from the said 90-day period to pay the remaining 90% of the purchase price. In other words, the purchaser was to pay the balance of 90% of the purchase price within a period of 120 days from the signing of the formal sale and purchase agreement.

In accordance with the MOU, the so-called deposit of 1% of the purchase price amounting to RM5,500 was paid by the purchaser to the vendor on 27 September 1993. However, the purchaser did not sign the formal sale and purchase agreement on 8 October 1993 as stated in the MOU, but on 11 October 1993. On 11 October 1993, the purchaser also deposited the balance of 9% of the deposit with his solicitors as stakeholders, but gave no notice of it to the vendor.

The vendor, however, did not sign the formal sale and purchase agreement on the ground that it was not signed by the purchaser within the time period stipulated in the MOU. The vendor then sold the property to another party, who are now the interveners in these proceedings.

As the decision of the court is based primarily on the so-called MOU, I reproduce below the full text of the MOU. It is in a standard form with particulars of the vendor, the purchaser, the property and the purchase price inserted in the blank spaces. It reads as follows:

MEMORANDUM OF UNDERSTANDING

This memorandum of understanding entered upon between Ramakrishnan a/l Kandasamy IC No 0396762 residing at No 21, Jalan Terasek Dua, Bangsar Baru, Kuala Lumpur as 'the vendor' and Abdul Rahim bin Syed Mohd IC No 450216-07-5019 residing at No 59, Jalan Telawi, Bangsar Baru, Kuala Lumpur as 'the purchaser' have agreed mutually as follows:

1 That the vendor agrees to sell, and the purchaser agrees to buy, the said property, Lot No 45284 Mukim Kuala Lumpur Daerah Wilayah Persekutuan situated at No 23, Jalan Setiabakti, Bukit Damansara, Kuala Lumpur in an as is where is condition together with fixtures, fittings and structure thereon free of all encumbrances and with vacant possession upon full payment for a total sum of RM550,000 (Ringgit Malaysia Five Hundred and Fifty Thousand only).

2 Schedule of Payment:

(i) an earnest deposit of 1% to be paid on 27 September 1993 as confirmation of purchase;

(ii) the balance of 9% of the initial deposit to be paid upon signing the sales and purchase agreement;

(iii) the remaining 90% to be paid within 90 days of signing the sales and purchase agreement; and

(iv) a further grace period of 30 days' extension to be provided with a chargeable interest rate of 9% to be mutually agreed upon.

3 All legal expenses, transfer and stamping fees and any other charge in respect of the sale and purchase agreement of the said property are to be borne by the above-named purchaser.

4 In view of this instruction, the parties above-named mutually agree to sign a formal sale and purchase agreement to this agreed sale property and complete the transaction on or before 8 October 1993.

Dated this 27 September 1993.

Vendor	:	Sgd	Purchaser	:	Sgd
IC No	:	0396762	IC No	:	450216-07-5019
Witness	:	Sgd	Witness	:	Sgd
Name	:	S Sivagnanam	Name	:	N Thinakay Kumar
IC No	:	7872460	IC No	:	4195596

The Purchaser's Case

The purchaser's main argument was that, upon the signing of the MOU, a binding contract for the sale and purchase of the said property came into existence. As such, it was argued that the vendor was under an obligation to sell the said property to the purchaser. The purchaser, therefore, sought specific performance of the said contract.

The Vendor's Case

The vendor's contention was that there was no binding contract between the parties for the following reasons:

(i) there was no binding contract between the purchaser and the vendor as the MOU by itself was not a legally binding contract for the sale and purchase of the property;

(ii) even if it was, the purchaser's failure to sign the formal sale and purchase agreement on or before 8 October 1993, as required by the MOU, entitled the vendor to terminate the agreement.

In support of the vendor's first contention, the vendor argued that the MOU was only an agreement to enter into a formal agreement, and until the formal sale and purchase agreement was entered into, no binding contract came into existence. For this purpose, the vendor relied on cases where the term 'subject to contract' or other similar formulae had been used by the parties.

The Law

Two preliminary observations need to be stressed at the outset. First, a contract for the sale of land is different in many ways from other contracts. As a consequence, the courts have formulated certain principles over the years in recognition of these differences. These principles are peculiar to transactions involving sale of land only.

Secondly, it must also be observed that a transaction for the sale of property in Malaysia cannot usually be completed within a short period of time. This is especially so if the land, the subject matter of the sale, is subject to existing encumbrances. Certain procedural steps would also have to be taken by both the vendor and the purchaser before the sale may be completed. Two main steps which the purchaser needs to take, for example, are: (a) to ensure that any encumbrances or restrictions on the title will not pose any problem in the purchase of the land; and (b) that sufficient funds are available to him so that he is in a position to pay the

purchase price within the time schedule as stated by the vendor. If the purchaser has any problems with either of these two matters, quite obviously he cannot proceed — and in most cases would not wish to proceed — with the purchase.

As a consequence, the standard sale and purchase agreement in Malaysia for the sale of property tends to be rather detailed, as it has to incorporate several essential terms. Besides the basic terms relating to the description of the property, identities of the parties and the purchase price, other terms which are commonly incorporated in the agreement provide for the vendor's obligation to give a title free from encumbrances; the manner in which the vendor intends to discharge any existing charge on the land; undertakings to be given by solicitors to hold the purchase price as stakeholders until the discharge of any existing charge, and the creation of a new charge, if any, by the purchaser. Provisions are also incorporated for the protection of the vendor's, purchaser's, and the chargee's interests pending registration of the transfer from the vendor to the purchaser. It is also not uncommon to make provisions for the entry of a private caveat by the purchaser.

These terms are essential to give full effect to the sale transaction. In the present case itself, the formal sale and purchase agreement prepared by the purchaser's solicitors, Messrs Achan and Lim, was nine pages long, incorporating about 21 main clauses.

It is therefore obvious that a transaction for the sale and purchase of land is not a simple matter. It needs professional attention. As such, most potential purchasers would not give a firm commitment to purchase the property at the time they view the property. Purchasers, to protect themselves, would usually insist that a certain grace period be given to them so that they may obtain professional advice, and also to satisfy themselves on certain matters before conclusively agreeing to purchase the property. In other words, a purchaser will not agree to bind himself to a legally binding contract on viewing a piece of property until he has conducted the necessary searches and made financial arrangements for the purchase. Therefore, as a general rule, the purchaser's acceptance will be a conditional one. It is a fundamental principle of the law of contract that a conditional or qualified acceptance of an offer does not bring about a legally binding contract: see s 7 of the Contracts Act 1950.

It is for some of these reasons that there is a general reluctance on the part of the courts to give full legal effect to any preliminary arrangement entered into by the parties until they are satisfied that all the detailed terms have been spelt out and agreed to by the parties. Therefore, agreements which are merely preparatory to the execution of a formal and detailed agreement, or agreements which merely spell out a general intention of the parties to enter into a contract for the sale and purchase of property are said to be inchoate agreements until the execution of the formal agreement. It is in this category of agreements that 'subject to contract' agreements,

A conditional contracts, option agreements and the like fall under. These preliminary arrangements, if embodied in a contract-like document, have sometimes been referred to as a 'letter of intent' (per Edgar Joseph Jr SCJ (now FCJ) in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, following Fay J in *Turriff Construction Ltd and*
B *Turriff Ltd v Regalia Knitting Mills Ltd* (1971) 9 BLR 20); or as 'a proposal to enter into a contract'; or 'an agreement to negotiate'; or as 'an agreement to agree'; or as in the United States, 'an agreement to negotiate in good faith': see generally the observations of Lord Ackner in the House of Lords decision, in *Walford & Ors v Miles & Anor* [1992] 1 All ER 453.

C These are all merely devices formulated by parties to agree that they may enter into a legally binding contract in the future. These agreements do not bring about a concluded sale and purchase agreement. Strictly speaking, such preliminary agreements are merely agreements to enable both parties to further negotiate the terms of the sale and purchase agreement without any obligation on either party to enter into the final sale
D and purchase contract. Over the years, these terms — like the grant of an option, conditional contract, subject to contract and other similar formulae, all of which have their origin in the English conveyancing practice — have gained similar recognition by the Malaysian courts. This is largely due to the reason that neither the Contracts Act 1950 nor the National Land
E Code 1965 contains any specific provisions dealing with contracts for the sale of land. Except for the provisions in the Housing Developers (Control and Licensing) Act 1966 and the rules made thereunder — which, again, are of limited application — no other specific legislation exists to deal with contracts for the sale of land. It is also often overlooked that though the Torrens system is applicable in Malaysia, the National Land Code 1965 —
F the principal legislation applicable in Malaysia relating to land matters — only deals with the post-contract position pertaining to the sale of land.

Though the true legal effect of option agreements, conditional contracts and contracts which are subject to contract, or similar formulae have all now, over the years, been clearly established by both English and
G Malaysian case law, unfortunately, parties and those who advise purchasers and vendors — like solicitors and estate agents, as in the present case — continue to draft documents in which their legal intention is not made clear. For example, in recent years, the courts in Malaysia have been called upon to determine the legal effect of another form of an arrangement
H called a 'booking pro forma' agreement. In *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & another appeal* [1981] 1 MLJ 56, the Privy Council held that such a booking pro forma signed by a purchaser remained an inchoate agreement, unless again all the terms of sale and purchase pertaining to the property were spelt out in the booking pro forma. And now, it is yet another document, called a memorandum of understanding,
I the validity of which is in issue.

In this regard, a principle of law which must also be borne in mind is that where the terms of an agreement are incomplete, the agreement is void for uncertainty: see s 30 of the Contracts Act 1950 and also the judgment of Lord Ackner in the House of Lords' decision in *Walford & Ors v Miles & Anor* [1992] 1 All ER 453; and also the recent cases of the Court of Appeal (Malaysia) in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 and *Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd* [1996] 2 MLJ 81. See also s 20(1)(c) of the Specific Relief Act 1950, which provides that specific performance will not be granted if the terms of an agreement are uncertain.

The Present Case

As pointed out earlier, the purchaser's contention was that there was an immediately binding contract for the sale and purchase of the house when he signed the MOU. The vendor, however, contended that no legally binding contract came into force until the formal sale and purchase agreement was executed on or before October 1993.

Both parties, in support of their contentions, had cited the usual anthology of cases relating to this area of the law: *Low Kar Yit & Ors v Mohamed Isa & Anor* [1963] MLJ 165; *Daiman Development Sdn Bhd v Mathew Lui Chin Teck & another appeal* [1981] 1 MLJ 56; *Masters v Cameron* (1954) 91 CLR 353; *Diamond Peak Sdn Bhd & Anor v Tweedie, DR* [1982] 1 MLJ 97; *Lim Keng Siong & Anor v Yee Ah Tee* [1983] 2 MLJ 39; *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284; *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108; *Koh Peng Moh v Yahiya* [1965] 1 MLJ 230; *Koh Peng Moh v Tan Chwee Boon* [1962] MLJ 353; *Choo Si Seng v Lee Boon Sai* [1986] 1 MLJ 466; *Tai Tong Realty Co (Pte) Ltd v Galstaun & Anor* [1973] 2 MLJ 95; and *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47.

I need not go through these cases, as these are familiar to all. Most of them, in any case, merely apply the same principle of law to the particular facts of the case. It, however, must be stressed that each case must be decided on its own facts. This is especially so in cases dealing with preparatory agreements where the intention of the parties plays a crucial role in determining its effect. In each case, it is the duty of the court to determine not only the nature of the document, but also the true intention of the parties at the time the document was executed — whether the parties intended to be bound by any contract immediately, or only on the fulfilment of certain conditions, eg the execution of a formal contract.

Recently, the (then) Supreme Court (now the Federal Court) of Malaysia had the opportunity to review some of these authorities. On my part, I adopt the principles as stated by Edgar Joseph Jr SCJ (now FCJ) in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 (though a case not dealing with the sale of land), explaining also the earlier decision of Peh Swee Chin SCJ (now FCJ) in the (then) Supreme Court in *Kam Mah Theatre Sdn Bhd v Tan Lay Soon*

[1994] 1 MLJ 108. The observations of Peh Swee Chin SCJ in *Kim Mah Theatre*'s case are also poignant. His Lordship observed (at pp 116–117):

> It is settled that the formula of 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract, 'formal' be it noted, is not to be understood in the common parlance as being just a 'mere formality' of no importance.

I also bear in mind the following dictum of Sir Garfield Barwick in the Privy Council decision of *Daiman Development Sdn Bhd v Mathew Lui Chin Teck and another appeal* [1981] 1 MLJ 56, where his Lordship made the following observation (at p 58):

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is *to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangement might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document* or the making of some further arrangement. The question is one as to expressed intention and is not to be answered by the presence or absence of any particular form of words. (Emphasis added.)

In so saying, I do not discount the fact that in certain exceptional cases where the intention of the parties is clearly established, an immediately binding contract may come into force, even though a formal agreement is to be executed subsequently. As Edgar Joseph Jr SCJ observed in *Ayer Hitam*'s case (at p 765):

> True it is that merely because the parties contemplate the preparation of a formal contract, that by itself will not prevent a binding contract from coming into existence before the formal contract is signed.

In the light of the above observations, I now consider the legal effect of the MOU. Like a booking pro forma in a contract for the sale of property under the Housing Developers (Control and Licensing) Act 1966 and the rules made therein; or an option agreement, or any other preliminary arrangement, the legal effect of the MOU — which, as stated earlier, is commonly used by estate agents — must be determined in the light of existing legal principles. In so doing, I bear in mind, as stated above, that a transaction for the sale of land is quite different from that for the sale of a book, for example.

In the present case, the purchaser, on viewing the property, expressed an interest in purchasing it. He had, at this stage, made no survey or technical inspection of the house; nor had he conducted any search on the title to determine whether there were any existing encumbrances on the land, or whether there were any special restrictions on the title regarding the transfer of the property. More importantly, at this stage, he had also

made no financial arrangements to secure a loan for purposes of settling the purchase price. It ought to be borne in mind that the purchase price was well over RM0.5m.

On the part of the vendor, his intention was clear: to sell the property to whosoever wished to purchase it, subject to certain conditions being fulfilled; namely, the time schedule for the payment of the purchase price. In furtherance of this intention, it was made clear to the purchaser that if the purchaser wished to purchase the property, he must be willing — and be in a position — to pay the purchase price within the time frame as stated in the MOU.

It must also be observed that the MOU contained no specific provision as to the effect of non-compliance of it by the parties; nor did it provide that until the specified date, the vendor was under an obligation not to sell the property to a third party. Further, if the MOU had stated that in consideration of the vendor promising not to do so, the money paid by the purchaser would be forfeited if the purchaser chose not to go on with the sale, no difficulties would have arisen. Time and again, the courts have stated that many of these problems may be avoided if only the consequences of either party not proceeding with the contract are expressly spelt out in the initial agreement itself. Despite these words of caution, such problems continue to arise.

The purchaser, under the MOU, paid 1% of the agreed purchase price 'as confirmation of purchase' on the date he signed the MOU, that is 27 September 1993. The MOU further provided that the balance of 9% of the purchase price would be paid within 11 days thereafter, that is on the date the formal sale and purchase was to be signed. This 11-day grace period was probably given to the purchaser to raise sufficient funds to pay the balance of 9% of the purchase price, and more importantly for the purchaser's solicitors to prepare the formal sale and purchase agreement. Within this brief period, the solicitors for the purchaser would also have to conduct the relevant searches in the land office, and also to determine the manner in which the vendor proposed to discharge the existing charge over the land so as to enable the vendor to give the purchaser a title free from encumbrances. As to the duties of the purchaser's solicitors, see the recent Federal Court decision in *Karuppannan Chellapan v Balakrishnan Subban & Ors* [1995] 1 SCR 19.

If the purchaser's contention that an immediately binding contract came into existence is accepted — that is on the date of the signing of the MOU — the purchaser will find himself in grave difficulties if, for example, he is unable to raise the necessary funds to pay the purchase price within the stipulated time or even if the purchaser's solicitors discover that the vendor's title to the land is subject to certain restrictions; or that the existing encumbrances created by the vendor could not be discharged; or even if it is discovered that the vendor is not the sole proprietor of the land or that he is merely a trustee, or a legal representative.

It must be emphasized that the MOU did not even state that the vendor was the registered proprietor of the land, nor gave a description of the title.

There may also be other terms which may not be acceptable to the purchaser. In any of these circumstances, the purchaser may not wish to proceed with the sale any further. And yet, if the purchaser's contention is upheld, and if he decides not to proceed with the purchase, the purchaser will be in breach of contract, enabling the vendor to sue the purchaser for damages. Clearly such was not the intention of the parties.

It appears to me that considering the MOU as a whole — and in particular, considering the objective of the MOU, particularly the 'genesis of the agreement', and the intention of the parties at the time of the signing of the MOU, the MOU is not a legally binding agreement. It is no more than an agreement to negotiate and as such, it is unenforceable.

A legally binding agreement, therefore, could only come into force upon the execution of the formal sale and purchase agreement, by which time the parties would have considered all aspects of the sale in detail, and a formal agreement prepared by the solicitors to cover all these aspects of the sale for execution. Until the execution of the formal agreement — as there is no binding contract between the parties — the parties are at liberty to resile from the so-called agreement without any legal consequences flowing from such an action. Such clearly appeared to be the intention of the parties at the time of the signing of the MOU, and that certainly is the effect of the MOU in law.

I am further fortified with the view that I have taken when I consider some of the terms which are embodied in the formal sale and purchase agreement prepared by the purchaser's solicitors, especially cll 1 and 12.

Clause 1 of the formal sale and purchase agreement expressly provides that a deposit would only be paid by the purchaser on the signing of the formal sale and purchase agreement, which deposit under cl 4.1 would be forfeited if the purchaser should default in the payment of the balance of the purchase price within the time stipulated. A distinction is drawn between the first payment of RM5,500 which is termed as earnest money, and the full 10% of RM55,000 as a deposit. The vendor had the right to forfeit the deposit, but not the earnest money which had been paid before the execution of the formal sale and purchase agreement. Furthermore, under cl 12 of the draft sale and purchase agreement, the purchaser was entitled to enter a private caveat only after payment of the full 10% of the purchase price as deposit — that is, after the execution of the sale and purchase agreement. It was, therefore, impliedly agreed that the purchaser had no right to enter a private caveat on the signing of the MOU, indicating that the MOU was not intended to bring into force a legally binding contract until the execution of the formal sale and purchase agreement.

In passing, I would observe that the MOU was a document which was unprofessionally drafted, quite obviously with no legal advice. It is my view that the use of such documents by estate agents ought to be discouraged, and that estate agents should seek legal advice before drafting such documents in the future. An option agreement whereby the purchaser pays a small consideration, and one which contains detailed terms of the sale and purchase, appears to be more appropriate. Such an option

agreement would give the purchaser reasonable time to consider, after making all the necessary inquiries and searches, whether to commit himself to the purchase. On the other hand, the vendor would be under an obligation — in view of the consideration paid — not to sell the property to a third party until after the expiration of the option period. An express clause should also be inserted in the option agreement to spell out the consequence in the eventuality the purchaser elects not to exercise the option — that is, any money (all or part thereof) paid to the vendor will be forfeited, and that neither party will be liable thereafter.

Alternatively, parties should be encouraged to enter into a lock-out agreement. Such an agreement, which is not well-known in Malaysia and which has gained recognition in England only recently, provides the purchaser some protection.

A lock-out agreement is an agreement which is entered into by a potential purchaser and a vendor of real property, whereby the vendor for good consideration agrees, for a specified period of time, not to negotiate with anyone except the potential purchaser in relation to the sale of his property in which the potential purchaser has expressed an interest in purchasing. Such an agreement was given judicial recognition by the House of Lords in *Walford & Ors v Miles & Anor* [1992] 1 All ER 453 and subsequently applied by the Court of Appeal in *Pitt v PHH Asset Management Ltd* [1993] 4 All ER 961. Lord Ackner (in *Walford*'s case), in holding a lock-out agreement to be enforceable, said (at p 461):

> There is clearly no reason in English contract law why A, for good consideration, should not achieve an enforceable agreement whereby B agrees for a specified period of time not to negotiate with anyone except A in relation to the sale of his property.

His Lordship further added (at the same page):

> There are often good commercial reasons why A should desire to obtain such an agreement from B. B's property which A contemplates purchasing may be such as to require the expenditure of not inconsiderable time and money before A is in a position to assess what he is prepared to offer for its purchase or whether he wishes to make any offer at all. A may well consider that he is not prepared to run the risk of expending such time and money unless there is a worthwhile prospect, should he desire to make an offer to purchase, of B, not only then still owning the property, but of being prepared to consider his offer. A may wish to guard against the risk that, while he is investigating the wisdom of offering to buy B's property, B may have already disposed of it or, alternatively, may be so advanced in negotiations with a third party as to be unwilling or for all practical purposes unable to negotiate with A.

There are two essential elements in a lock-out agreement: (a) the agreement must contain a negative undertaking; and (b) it must be for a fixed duration. Such a lock-out agreement is treated as collateral contract if a subsequent contract is entered into between the parties. As a lock-out agreement is an independent and binding agreement, a breach of the lock-out agreement by the vendor will entitle the purchaser to sue for damages.

A It therefore appears to me that one of the most appropriate means of preventing a vendor from 'gazumping' — that is, attempting to sell the property at a higher price subsequently — is for the purchaser to give a small consideration for the vendor's promise not to sell the property to a third party for a specified period. The giving of such consideration would assure the purchaser that the vendor is under an obligation not to sell the B property to anyone else but the purchaser whereas the purchaser is under no obligation to purchase the property. It must be stressed that by this arrangement, neither party has committed himself to a legally binding contract for the sale of the property. All that has been agreed is that the vendor will not sell the property to a third party during the specified time.

C Finally, as a word of caution, in cases where parties still choose to enter into a conditional contract or a 'subject to contract' agreement, the parties ought to be advised to state expressly in the document that in the event of any failure on the part of either party to fulfil his specified obligations, certain specific consequences will follow — the forfeiture of D any deposit paid or the termination of the agreement with or without any other legal consequences.

Conclusion on the MOU

I therefore hold that by the signing of the MOU itself, no binding contract E came into effect between the purchaser and the vendor. In other words, I hold that the MOU falls within the category of agreements which are not legally enforceable.

The plight of the purchaser in the present case was no different from that of many other purchasers, or even that of vendors in some cases who enter into F such agreements. Such a position of many a vendor or a purchaser was aptly described by Sir Thomas Bingham MR (as he then was) in *Pitt v PHH Asset Management Ltd* [1993] 4 All ER 961. This is what he said (at p 967):

> For very many people their first and closest contact with the law is when they come to buy or sell a house. They frequently find it a profoundly G depressing and frustrating experience. The vendor puts his house on the market. He receives an offer which is probably less than his asking price. He agonizes over whether to accept or hold out for more. He decides to accept, perhaps after negotiating some increase. A deal is struck. Hands are shaken. The vendor celebrates, relaxes, makes plans for his own move and takes his house off the market. Then he hears that the purchaser who was formerly H pleading with him to accept his offer has decided not to proceed. No explanation is given, no apology made. The vendor has to embark on the whole dreary process of putting his house on the market all over again.
>
> For the purchaser the process is, if anything, worse. After a series of futile visits to unsuitable houses he eventually finds the house of his dreams. I He makes an offer, perhaps at the asking price, perhaps at what the agent tells him the vendor is likely to accept. The offer is accepted. A deal is done. The purchaser instructs solicitors to act. He perhaps commissions an architect to plan alterations. He makes arrangements to borrow money. He puts his own house on the market. He makes arrangements to move. He then learns

> that the vendor has decided to sell to someone else, perhaps for the price already offered and accepted, perhaps for an increased price achieved by a covert, unofficial auction. Again, no explanation, no apology. The vendor is able to indulge his self-interest, even his whims, without exposing himself to any legal penalty.

Finally, as there was no mention in the MOU as to the effect of the 1% of the purchase price deposit paid by the purchaser on the signing of the MOU in the eventuality that a formal sale and purchase agreement was not entered into — and as the MOU is not a binding contract — the said sum ought to be refunded to the purchaser.

Time

The second argument raised by the vendor is that even if the MOU was a valid and legally binding agreement, as time was of the essence of the agreement the failure on the part of the purchaser to pay the balance of the purchase price on 8 October 1993 constituted a breach of the agreement which entitled the vendor to terminate the agreement.

On this issue, the purchaser's counter-argument was as follows: that time was not of the essence of the contract, even though the MOU stated that the formal sale and purchase agreement must be executed before 8 October 1993.

In Malaysia, the law relating to time for the performance of obligations by parties under a contract is provided for in s 56 of the Contracts Act 1950. Of particular importance is s 56(1), which provides as follows:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

The Privy Council, in interpreting similar provisions under the Indian Contract Act, has held that this section gives statutory effect to the English rule relating to time. Viscount Haldane, in the case of *Jamshed K Irani v Burjorji Dhunjibhai* (1915) LR 43 IA 26, observed of s 55 of the Indian Contract Act (s 56 of the Malaysian Act):

> Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land.

This interpretation of s 56 has subsequently been adopted by the Malaysian courts in several cases: see Sinnadurai, *Law of Contract in Malaysia and Singapore* (2nd Ed) at pp 588–603.

Therefore, under the Contracts Act 1950 — as well as under English law — time, in a contract for the sale of land, is of the essence in two main situations: (i) where the intention of the parties was such that time was of the essence of the contract for the fulfilment of their respective obligations; and (ii) the nature of the subject matter or the surrounding circumstances are such that the time specified for the performance is of the essence. Other than under these two circumstances, time in a contract for the sale of land is not of the essence.

There is little difficulty in considering whether time is of the essence of a contract if there is an express provision in the contract itself stating that it is so. In contracts where the phrase 'time is of the essence' is employed, it is generally accepted that the parties in these cases have clearly intended that the provision dealing with time is an essential term of the contract. In such cases, both parties must perform their respective obligations within the time stipulated. If either party fails to do so, under s 56(2) of the Contracts Act 1950, the other party is entitled to repudiate the contract.

Where there is no express provision in the contract making time of the essence, the courts will then have to consider the nature of the property, the surrounding circumstances and the nature of the contract to determine whether time was intended by the parties to be the essence of the contract. In *Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118, time was not expressly stated to be of the essence. It was held that considering the intention of the parties, and on an 'examination amongst other things of attendant circumstances', time was of the essence of the contract in question. But in the following cases, for example, where there was no express provision making time of the essence, time was held not to be of the essence: *Warren, HG v Tay Say Geok & Ors* [1965] 1 MLJ 44, *Koh Shey Guan v Lee Kok Chan* [1971] 1 MLJ 79, *Ayadurai v Lim Hye* [1959] MLJ 143 and *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23.

It should be emphasized that — as pointed out by the Federal Court in *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 — the mere stipulation of a date fixed for completion in a contract does not, by itself, make time to be of the essence of the contract. The nature of the property and the surrounding circumstances would still have to be considered in such cases.

In the light of the above principles, I now move on to consider whether time was of the essence of the contract entered into between the purchaser and the vendor.

The MOU expressly stipulated that a formal sale and purchase agreement had to be executed and the sale transaction completed 'on or before 8 October 1993'. Of course, as stated earlier, this stipulation by itself does not make time of the essence of the contract. Other factors need to be considered. Under the

MOU, there is a schedule of payment providing that 1% of the purchase price was to be paid on 27 September 1993, the balance 9% to be paid on or before 8 October 1993; that is, on the execution of the formal sale and purchase; and the remaining balance of 90% within 90 days from the signing of the sale and purchase agreement. As regards this last payment, the MOU provided for a further grace period of 30 days. There was no mention of any grace period for the payment of the first two payments, clearly therefore evincing an intention on the part of both parties that time was of the essence for the payment of these two payments.

Further, in considering the nature of the property — and more specifically, the nature of the MOU itself — it appears to me that time was of the essence of the contract. This was a preliminary agreement between the two parties for the sale and purchase of the property. The first two payments related to the payment of a deposit to indicate the earnestness of the purchaser to go on with the contract. Clearly, what was in the mind of the vendor was that, if the purchaser was not in a position — or was unwilling — to comply with the schedule of payment and the signing of the formal sale and purchase agreement within the specified period, the vendor would no longer wish to be bound by the contract. The vendor had clearly stated in evidence that he wished to sell the property as he needed the money. Similarly, the purchaser had also indicated that he needed a house to live in. Therefore, there was a clear intention on the part of both parties to complete the sale as scheduled. Their intention was clearly to make time of the essence of this contract.

There is yet another reason as to why I take the view that time was of the essence of the contract. This MOU, like an option agreement or a conditional contract, dealt with the initial stages of a sale transaction. As stated earlier, it was in the nature of a 'letter of intent'. Unlike other contracts which have been partly executed, many of the obligations remain outstanding under the MOU. The parties, under the MOU, were still in the stage of having only entered into an initial contract to bring into effect a subsequent main contract for the sale of the property, which contract would incorporate all the other duties and obligations of the parties. Until this initial contract was concluded, the main contract for the sale of the property could not be fully executed. In such types of initial contracts, time is generally of the essence. It is for this reason that in option agreements, time is generally considered to be of the essence: *Loh Boon Siew v Chin Kim & Anor* [1972] 1 MLJ 139.

Similarly, in conditional contracts, where the contract of sale fixes a date for performance of a particular condition, the courts have held that time being of the essence, that condition ought to be fulfilled by that date: see generally the principles spelt out by Lord Jenkins in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47 (PC) and *Jaafar bin Ibrahim v Gan*

Kim Kin [1985] 2 MLJ 24 (FC). As to the importance of time in a lock-out agreement, see *Walford & Ors v Miles & Anor.*

Furthermore, in such cases, where the condition is not promissory in nature but rather contingent — the contingency in the present case being the execution of the sale and purchase agreement before 8 October 1993 — equitable principles relating to time do not apply. As Gibbs CJ said in the Australian High Court decision in *Perri v Coolangatta Investments Pty Ltd* (1982) 56 ALJR 445 at p 448:

> ... I consider that when the time has elapsed for performance of a condition which is not a promissory condition, but a condition precedent to the obligation to complete a contract of sale, either party, if not in default, can elect to treat the contract as at an end if the condition has not been fulfilled or waived, and that it is not necessary first to give a notice calling on the party in default to complete the contract or fulfil the condition ... the time fixed by the contract for performance of the condition [is] not to be extended by reference to equitable principles ...

I may also observe in passing that the draft sale and purchase agreement prepared by the purchaser's solicitors itself, by cl 13, expressly provided that time should be deemed to be of the essence of the agreement.

I therefore conclude in the present case that even if the MOU is regarded as a binding contract, the failure on the part of the purchaser to pay the 9% of the purchase price and to execute the sale and purchase agreement on 8 October 1993 entitled the vendor to repudiate the contract. As the obligation was on the purchaser to ensure that both the 9% of the purchase price and the execution of the formal sale and purchase agreement (at least on his side) were completed by 8 October, his failure to comply with these conditions was fatal to his case. If the purchaser had at least fulfilled his obligation, and if subsequently the vendor had refused to sign the sale and purchase agreement, it would have been a different story. The obligation on the part of the vendor to sign only arises when the purchaser has completed his part of the bargain: see generally s 52 of the Contracts Act 1950 dealing with reciprocal promises and the case of *Central Malaysia Development & Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174.

Removal of Caveat

In the originating summons, the vendor applied to remove the caveat entered by the purchaser. In the light of the view I have taken — that there was no binding contract between the purchaser and the vendor under the MOU; or that even if there was one, the purchaser was in breach of the contract in not fulfilling the conditions stipulated in the MOU — I hold that the purchaser has no caveatable interest in the land. The vendor's application under the originating summons for the removal of the caveat entered by the purchaser is therefore allowed.

Interveners' Interest

The interveners' interest in this action is relevant only if the purchaser had succeeded in his claim against the vendor. In view of the conclusion I have reached, there is no question of competing interests or priorities arising between the purchaser and the interveners; and as such, the interveners' position remains unaffected by this decision.

Order accordingly.

Reported by Tey Tsun Hang